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No. 95-821

In The

Supreme Court of the United States

October Term, 1995

MARY MARTIN, Guardian of Michael Martin,

Petitioner,

v.

PATRICIA MAJOR and LEETA MARTIN,

Respondents.

Petition For Writ Of Certiorari
To The Michigan Supreme Court

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Michael Martin lives in a nursing home where he appears to be content with his life. All parties and courts agree that he is not terminally ill, not in a comatose or persistent vegetative state, and not in pain. He receives food and water through a feeding tube. Petitioner, Martin's wife and legal guardian, sought court permission to authorize the feeding tube removal. The Michigan Supreme Court held that the common law doctrine of informed consent allows petitioner to authorize the feeding tube removal if the evidence clearly and convincingly shows that Martin, while competent, issued directives embracing the nature and status of his current condition. After evaluating the testimony, the Court ruled that petitioner's uncorroborated testimony concerning his previous statements did not rise to the level of clear and convincing evidence.

Petitioner seeks review of the Michigan Supreme Court decision that Martin should be allowed to continue to live, claiming the decision is an "extreme response" to those cases which have confronted the right to withdraw medical treatment. Respondents, Martin's sister and mother, oppose granting a Writ of Certiorari because Michigan's decision is consistent with those of other courts including this Court, and because the petitioner seeks an extreme result – the removal of the feeding tube of a person who appears content with his present condition and surroundings, who is expressing a current desire to live, and who is not in great pain, terminally ill, or in a persistent vegetative or comatose state. Had the Court held for the petitioner, *Martin* would have been the first

QUESTIONS PRESENTED – Continued

appellate case nationwide authorizing withdrawal of life supports from an incompetent person who was neither in a persistent vegetative state nor terminally ill. The Michigan Supreme Court was unwilling to cross that threshold on the facts of this case. Two questions are presented:

> (1) Whether a state court violates a person's fundamental Fourteenth Amendment liberty interests by denying a guardian's petition to withdraw a feeding tube and terminate the person's life, where the court recognizes the common law right of informed consent, acknowledges that the person is not in a comatose or persistent vegetative state, not terminally ill, and not in pain, and the court rules that the guardian's uncorroborated statements concerning the person's purported wish to have his feeding tube withdrawn because of his present medical condition do not meet the state's clear and convincing evidence standard.

> (2) Whether a state court violates a person's fundamental liberty interests by failing to hold that a guardian has been appointed as a "surrogate" to make treatment decisions for the person, where the guardian has failed to raise the issue in the state courts, and where the evidence, if evaluated, would be substantially weaker than the evidence which the court evaluated in determining that the guardian had failed to prove by clear and convincing evidence that the person would want his feeding tube withdrawn in his present medical condition.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondents, Patricia Major and Leeta Martin, Michael Martin's sister and mother, ask this Court to deny a Writ of Certiorari to review the judgment and opinion of the Michigan Supreme Court in this case for reasons stated below.

JURISDICTION

Respondents contest this Court's jurisdiction as to petitioner's Issue I because the Michigan Supreme Court decision was made on the basis of Michigan's recognition of the common law doctrine of informed consent, and because it properly determined on the facts that petitioner had failed to present clear and convincing evidence of what Michael Martin's wishes were regarding the withdrawal of life support equipment in his present medical condition. Respondents contest this Court's jurisdiction as to petitioner's Issue II for the reasons stated above, and because petitioner failed to raise and argue this issue in the courts below, SUP. CT. R. 14.1(h).

COUNTERSTATEMENT

Respondent responds to the numbered paragraphs in petitioner's petition as follows:

1. The Michigan Supreme Court, in considering the central issue in this case – the factual content and sufficiency of Michael Martin's previously stated desires – prefaced its discussion by observing that:

> [O]ur review of the record reveals that virtually all the witnesses agreed that Mr. Martin is not in a vegetative state and is not suffering from the type of incapacitation referenced in his expression of a desire not to continue life-sustaining

medical treatment. *In re Martin*, 450 Mich. 204, 229, ___ N.W.2d ___ (1995).

The Michigan Court of Appeals decision in this case, *In re Martin*, 205 Mich. App. 96, 99, 517 N.W.2d 749 (1994) observed that "Michael remains conscious, he has some awareness of his surroundings, and he can communicate to some extent through head nods."

The trial court, in its post-remand ruling from the bench, observed that Martin:

> [I]s not in a persistent vegetative state, nor is he terminally ill in any common sense of the word. Terminal, obviously, if they pull the tube, – but no, he is not terminally – that he has some disease at the moment that . . . would be medically said that he was going to die. Right now he is just prone to infections, obviously, but he is expected to have a normal life expectancy. [Probate Court Vol. 7, post remand, p. 115; included in Appellee's [now Appellant's] Appendix to her brief on appeal to the Michigan Supreme Court, Vol. II, p. 556b.]

The trial judge's own direct observations of Michael support that holding.[1] (T92. Vol. VIII pp. 12-16) (Mich R pp. 98a-102a).

Dr. Kreitsch, a certified physiatrist and director of the brain injury section of the Mary Free Bed Facility in Grand Rapids, MI (T92. Vol. IV pp. 155-158) testified that, using the general Rancho Los Amigos Scale of Cognitive Awareness for people who have brain injuries, Martin's behavior placed him at Level Five with aspects of Level

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[1] Judge Greig discussed his visit with Martin the previous day. He reported that Martin appropriately communicated his need for a guardian, his specific job at Godwin School, that he had been a member of a pit crew at a local race track, that he could move his right, but not his left side, and did so on command.

Six out of eight levels – Level One being totally comatose and unresponsive and Level Eight being functional. According to Dr. Kreitsch, individuals in Level Five are "pleasant and cooperative but disoriented." (T92. Vol. IV pp. 173-176; T93 Vol. 3 p. 89). Dr. Kreitsch further stated that Martin cooperated to the limit of his ability by showing affect, often smiling and giving yes and no responses by head nods to verbal questions. Martin indicated that he was having no pain in general and could not recall having had much pain recently. Martin seemed "pleasant and attentive." Martin indicated that he could watch TV and follow some shows. "He brightened up with a large grin when asked if he liked cartoons." (Mich R pp. 32a-38a; T92. Vol. IV pp. 162-176).

Martin's condition was not so easily tolerated by his guardian, who testified:

> I think that taking a person, such as Mike, since he himself was a private person . . . , and displaying him in a public atmosphere, I think, was a degrading area to part of his life.
>
> I mean, if it wasn't bad enough that at Halloween they dressed him up as an M&M – . . . and normal every day people see someone that is severely impaired, they are stared at, they are looked at, children don't understand, they sit and make comments, and that has got to be very degrading. I would not want to be in a position like that to be out in a public place and I don't think that I would want that for Mike.
>
> And I think going to a Tiger Stadium where a lot of people take their children Mike and others from the facility probably were degraded more than got enjoyment out of – because I don't think they understood what they were even doing there, whether they even understood that it was a ball game. . . .

> I've gone in where Mike has been in the TV room with others from the facility. To me that wouldn't be degrading because he's with, I guess you'd have to say others that are in the same situation as him, but they're not out on display in a public way; and I think to publicly take these people out to bowling alleys and things like that I think is wrong. (T93. Vol. II; p. 78-79).

Chief Justice William Rehnquist, in this Court's *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 286 (1989) decision, observed that:

> Close family members may have a strong feeling – a feeling not at all ignoble or unworthy, but not entirely disinterested, either – that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading.

Elements of that concern are present here, as shown by the guardian's testimony quoted above. There is little wonder that the community of people with disabilities is concerned about the potential impact that a case such as this could have if, indeed, third parties are allowed to decide whether to allow or withdraw life supporting medical equipment without the requirement of a clearly and convincingly expressed previous intent.[2]

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[2] Two amicus briefs were submitted to the Michigan Supreme Court supporting the respondents herein. Michigan Protection and Advocacy Service, Inc., a federally funded and chartered organization with the specific mission of protecting the rights of people with disabilities submitted a brief for itself, American Disabled Assistant Programs Today (ADAPT), the Association for Community Advocacy, the ARC of Michigan, the Autism Society of Michigan, the Disability Rights Bar Association, the Disability Network, and United Cerebral Palsy of Michigan. The National Legal Center for the Medically

2. Petitioner's assertion that numerous constitutional issues were raised below is true. However, it is important to note that it was the respondents who raised the majority of those issues. Of even greater importance, petitioner never raised the constitutional claim now stated as her Issue II, choosing instead to rest upon her authority as a guardian under Michigan guardianship law.

The petitioner refers to the appointment of a Guardian ad Litem [GAL] in the courts below. The fact is that the person so appointed acted as the GAL for both Martin *and* his minor children. The fundamental injustice created thereby is shown in the following portion of the GAL's closing argument to the trial court at the remand hearing:

> I don't think there's any question that Michael Martin can never again be a functioning, effective father, or for that matter, person. So for that reason, as I said in my report, my joint assessment of what is in the best interest of Michael Martin's two minor children for whom I've been appointed their guardian-ad-litem is that neither of them are being served by the continuation of his catastrophically impaired life, nor is there any reasonable or realistic expectation that this situation will ever change. (T93. Vol. 7, p. 121).

3. Much of what petitioner claims here already has been addressed in paragraph 1, above. All parties and the courts clearly recognized that, whatever Martin's current physical and mental abilities might be, he appears content with his present condition and surroundings, and is

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Dependent and Disabled submitted an amicus brief on behalf of itself, the Michigan Handicapper Caucus and the Ethics and Advocacy Taskforce for the Nursing Home Action Group.

not in great pain, terminally ill, or in a persistent vegetative or comatose state. Being a "total care patient" is neither the functional nor logical equivalent of being in a persistent vegetative state. Petitioner's footnote 5 establishes nothing more than Martin's legal incapacity to make decisions concerning his care and treatment.

Martin's cognitive skills and abilities were assessed in detail in the neuropsychological report of Dr. Walter Zetusky, who has doctorates in neurochemistry and neuropsychology and has extensive experience working with individuals who have brain injuries. (T93. Vol. 3 pp. 151-158). The Neurologic Center asked Dr. Zetusky to evaluate Martin in 1990 for treatment purposes only.[3] His report (Mich R pp. 42a-45a) and later testimony (T93. Vol. 3. pp. 165-181p; Mich R pp. 46a-62a) establish that Martin has an intelligence quotient of 63, but because of a significant degree of scatter due to concentration and communication problems, it could be as high as 77, with the average IQ being between 90 and 110.

Petitioner cites to Martin's "numerous" uncorroborated discussions with her concerning his wishes and not using "machines." The record does not support a finding that Martin's previous expressions of intent to not live in a dependent state included the desire to have food and water withheld, nor is there any suggestion that he had an informed understanding of the consequences of such withdrawal, which would result in a slow and painful death by starvation.

Equally important, all testimony purportedly supporting the claim that Martin previously had authorized

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[3] Dr. Zetusky's evaluation and IQ testing and report occurred 1½ years before the petitioner filed her Petition for Removal of Life Supports.

the withdrawal of food and water in his present circumstance came from a single source – his guardian and wife. As the *Cruzan* Court suggested, the quality and quantity of the testimony petitioner now claims constituted clear and convincing evidence likely would not have been permitted into court had this been a run-of-the-mill civil suit, due to application of the statute of frauds, the parol evidence rule and the hearsay rules, *Cruzan*, at 285. Indeed, under Michigan's Designation of Patient Advocate Act[4] the petitioner would not be permitted to act even as a witness to his written designation of an advocate. It is that same testimony of uncorroborated statements to petitioner which she now claims for the first time also operated to designate her as Martin's surrogate. This is especially significant given the possible conflict of interest and petitioner's comments regarding the degradation.

4. The petitioner accurately reports the Michigan Court of Appeals decision [*Martin II*] in this paragraph. However, the Michigan Supreme Court reversed the Court of Appeals after stating the "clear and convincing evidence" standard[5] it adopted in its decision. The Court

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[4] MCL 700.496; MSA 27.5496. The Act was enacted several years after Martin's catastrophic accident.

[5] The Court stated that clear and convincing evidence is such evidence which:

> "produce[s] in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." . . . Evidence may be uncontroverted, and yet not be "clear and convincing." . . . Conversely, evidence may be "clear and convincing" despite the fact that it has been

specifically found that the petitioner's uncorroborated testimony and affidavit was not "so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue, [citation omitted]." *Id.*, 450 Mich. at 233. The evidence, even if accurate, simply was not substantial enough to justify the authorization the petitioner sought, nor is it sufficient to support the claim now made that Martin "designated" his guardian as his lawful "surrogate."

5. Petitioner for the first time raises the question of why the Michigan Supreme Court "was free to disregard Michael's clear wish to have Mary take charge of his treatment decisions in the event of his incapacity."[6] There is no record evidence whatsoever that Martin specifically stated to petitioner that he designated her as his surrogate. She relies instead on such rough comments as that "I will haunt you" to indicate Martin's alleged desire that petitioner be his surrogate. Not one other witness, including those friends with whom Martin had discussed not living like a vegetable, testified on that point.

When this case first was filed, this Court's decision in *Cruzan* already was two years old. There was no question that petitioner had the burden of proof on all issues, nor was there any question in Michigan that her constitutional standard of proof, also per *Cruzan*, was "clear and convincing" evidence. The case was tried as a power of guardian case, and the Michigan Supreme Court properly held that the common law doctrine of informed consent, assuming the burden of proof was met, allowed a third party to exercise the choices of a formerly competent

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contradicted. [*In re Jobes*, [108 N. J. 394, 529 A.2d 434 (1987)] at 407-408.] *Id.*, 450 Mich. at 227.

[6] Petitioner's Petition for Writ of Certiorari, p. 9.

person. Thus, Michigan law provides access to surrogate decision making, but the Supreme Court said the evidence here does not meet Michigan standards.

Using the doctrine of informed consent and the clear and convincing evidence standard, the Michigan Supreme Court protected both the petitioner's right to due process, and Martin's right not to be separated from his daily food absent evidence meeting the enunciated standard. The petitioner could not meet her burden with the facts presented at the hearings. Petitioner's loss on the facts is not elevated to a constitutional violation under either theory here advanced by petitioner. Plainly and simply, the *Martin* Court did what courts across the states have done over these past twenty years. The Court took the state of the accepted law on cases involving the withdrawal of life support systems, as developed in the laboratory of the states, and fairly applied it to the facts here.

REASONS FOR DENYING THE PETITION

The Missouri Supreme Court, in *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988), affirmed by this Court in *Cruzan, supra*, identified what might be the key force behind a state's interest in preserving the lives of people who are in situations similar to Michael Martin's. The Court stated:

> Where the patient is not terminally ill, as here, the profoundly diminished capacity of the patient and the near certainty that the condition will not change leads inevitably to quality of life considerations. The argument made here, that Nancy will not recover, is but a thinly veiled statement that her life in its present form is not worth living. Yet a diminished quality of life does not support a decision to cause death. *Cruzan v. Harmon*, 760 S.W.2d at 424.

The petitioner's brief infers that the history of state court involvement in cases questioning the authority of surrogates to exercise the treatment interests of people unable to do so for themselves is a recent development. This is not true. The first reported state appellate court decision on the issue, *In re Quinlan*, 355 A.2d 647 (N.J., 1976) *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976), was litigated more than twenty years ago, and was decided nineteen years ago. Since *Quinlan*, multiple states have confronted the general issue presented here. Indeed, all 50 states and the District of Columbia now have some form of living will or patient advocacy statute in place to address the surrogate decision making issue.[7]

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[7] Indeed, this Court received and denied eight petitions for Writ of Certiorari on these issues in the fifteen years prior to its decision in *Cruzan*, including the *Quinlan* case: *In re Philip B.*, 156 Cal. Rptr. 48 (Ct. App. 1979), *cert. denied sub nom. Bothman v. Warren B.*, 445 U.S. 949 (1980); *Drabick v. Drabick*, 245 Cal. Rptr. 840 (Ct. App.), *cert. denied*, 488 U.S. 958 (1988), *reh'g denied*, 488 U.S. 1024 (1989); *In re Prange*, 520 N.E. 2d 946 (Ill. App. Ct.), *vacated*, 527 N.E. 2d 303 (Ill.), *cert. denied sub nom. Murphy v. Benson*, 488 U.S. 892 (1988); *In re Infant Doe*, No. GU8204-00 (Ind. Cir. Ct. Monroe County Apr. 12, 1982), *writ of mandamus dismissed sub nom. State ex rel Infant Doe v. Baker*, No. 482 S 140 (Ind. May 27, 1982), *cert. denied*, 464 U.S. 961 (1983); *In re Jobes*, 529 A.2d 434 (N.J.), *reconsideration and stay denied*, 531 A.2d 1360 (N.J. 1987), *cert. denied sub nom. Lincoln Park Nursing & Convalescent Home v. Kahn*, 483 U.S. 1036 (1987); *Quinlan, supra; In re Storar*, 420 N.E. 2d 64 (N.Y.), *cert. denied*, 454 U.S. 858 (1981); *Weber v. Stony Brook Hosp.*, 456 N.E. 2d 1186 (N.Y.), *cert. denied*, 424 U.S. 1026 (1983). Since *Cruzan*, this Court has denied at least four more such petitions: *In re Baby "K,"* 16 F.3d 590 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 91 (1994); *Johnson v. Thompson*, 971 F.2d 1487 (10th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3581 (U.S. Feb. 23, 1993); *In re Jane Doe*, 583 N.E.2d 1263 (Mass. 1992), *cert. denied sub nom. Doe v. Gross*, 112 S. Ct. 1512 (1992); *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied sub nom. Kevorkian v. Michigan*, 115 S. Ct. 1795 (1995).

Against this backdrop, this Court's *Cruzan* decision did not state new law or change the way most state courts evaluated surrogate requests. Rather, *Cruzan* ratified the principle that the states are the proper laboratory within which these issues should be debated and decided; and that the states' interests in protecting the lives of its citizens through the adoption of strict measures to insure the validity of a previously expressed intent does not offend the Fourteenth Amendment.

The Michigan Supreme Court recognized that an individual has the right to refuse unwanted medical treatment, but also noted the state's interest in protecting life. Key to its decision was the fact that Martin, while legally incompetent, is not in pain, terminally ill nor in a persistent vegetative state. Under those facts, the Court stated that Michigan would not permit withdrawal of life sustaining medical treatment on the basis of any test utilizing objective criteria, including the substituted judgment test or best interest test. *Martin, supra,* 450 Mich. at 224, 225.[8]

The *Martin* Court decision here follows the analytical path carved by the several states and *Cruzan* over the past twenty years. In its mainstream decision the Court did not reject the petitioner's claim that she had the right

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[8] The Court wrote:

> We cannot stress too strongly that the complexity and ramifications of any decision in this area caution against moving too swiftly or adopting controversial decision-making standards in cases that do not present facts compelling such decision. The right of informed consent extends only to the decisions this particular patient has made. Any objective analysis is not encompassed within the right of informed consent. As we noted at the outset, if we are to err, we must err in preserving life. Our first step in this area must be a careful one. *Id.*, 450 Mich. at 225.

to assert Martin's rights for him. The Court instead recognized that her right was not absolute, and rejected the evidence she presented to support her claim that she was doing what Martin would have wanted her to do. In so doing, the Court followed the tenets and evidence standards tested by the laboratory of the states and ratified in *Cruzan*. As argued below, the Court's factual determination and legal analysis was consistent with the state supreme court level decisions in *In re Westchester County Medical Center on behalf of O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607 (N.Y., 1988) (O'Connor), and *In re Jobes, supra*, where the courts declined to authorize the removal of life support systems despite evidence of intent substantially more developed and compelling than the uncorroborated evidence presented here.[9]

Petitioner poses two arguments here. She first claims that the Michigan Supreme Court unconstitutionally extended the scope of *Cruzan* by appending what she refers to as a "special circumstances" test to the type of "clear and convincing evidence" test approved by this Court in *Cruzan*. Second, she claims for the first time that the Michigan Supreme Court improperly and unconstitutionally infringed upon Martin's 14th Amendment rights by refusing to defer to petitioner's right as his surrogate to make treatment decisions. These claims are addressed below.

Before addressing petitioner's claims, however, it is necessary to review this Court's holding in *Cruzan* to identify precisely what was decided. In *Cruzan*, this Court was asked on 14th Amendment grounds to reverse a Missouri Supreme Court decision upholding the need for strict compliance with a state living will statute in order for a third party to effectuate the withdrawal of the

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[9] See *Cruzan, supra*, 285, fn. 11.

life support systems of a person incapable of authorizing the termination herself because she was in a persistent vegetative state. The case was framed as one pitting the state's right to enforce its statutes against the purported constitutional violation which would occur if a third party were not permitted to step in and assume the constitutional rights of the petition subject. Chief Justice Rehnquist, writing for the majority, rejected this proposition. He wrote that:

> Here again petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way.
>
> No doubt is engendered by anything in this record but that Nancy Cruzan's mother and father are loving and caring parents. If the State were required by the United States Constitution to repose a right of "substituted judgment" with anyone, the Cruzans would surely qualify. *But we do not think the Due Process Clause requires the State to repose judgment on these matters with anyone but the patient herself.* Close family members may have a strong feeling – a feeling not at all ignoble or unworthy, but not entirely disinterested, either – that they do not wish to witness the continuation of the life of a loved one which they regard as hopeless, meaningless, and even degrading. *Id.*, at 286, [emphasis added].

After summarizing and discussing the many state decisions which had addressed this issue, Chief Justice Rehnquist observed that:

> As these cases demonstrate, the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment. Beyond

> that, these decisions demonstrate both similarity and diversity in their approach to decision that of what all agree is a perplexing question with unusually strong moral and ethical overtones. State courts have available to them for decision a number of sources – state constitutions, statutes, and common law – which are not available to us. In this Court, the question is simply and starkly whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did. . . . *Id.*, at 277.

The balance between the person's interest and the state's interest likewise was evaluated. The Court noted Missouri's claim that it had a legitimate "interest in the protection and preservation of human life," *Id.*, at 280, and agreed that "there can be no gainsaying this interest." *Id.* The Court then observed that:

> [I]n the contest presented here, a State has more particular interests at stake. The choice between life and death is a deeply personal decision of obvious and overwhelming finality. We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. *Id.*, at 281.

Balancing that interest against an individual's Fourteenth Amendment liberty interests, the Court explained that:

> It cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment. Not all incompetent patients will have loved ones available to serve as surrogate decisionmakers. And even where family members are present, "[t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient." *In re Jobes*, [*supra*]. A State is entitled to guard against potential abuses in such situations. *Id.*

The Court then ruled that, indeed, Missouri did have the right to choose a route or process by which such claims could be tested by the state within its judicial system. The Court stated:

> We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically-able adult to starve to death.
>
> . . .
>
> . . . We believe Missouri may legitimately seek to safeguard the personal element of this choice through the imposition of heightened evidentiary requirements. . . . A state is entitled to guard against potential abuses in such situations. Similarly, a State is entitled to consider that a judicial proceeding to make a determination regarding an incompetent's wishes may very well not be an adversarial one . . . Finally, we think a State may properly decline to make judgments about the "quality" of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interest of the individual. *Id.*, 280-282.[10]

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[10] This holding, that the state may "safeguard the personal element of this choice" through "heightened evidentiary requirements," necessarily included the right to:

> . . . [P]lace an increased risk of erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment . . . In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state. *Id.*, at 283.

As in *Cruzan*, the test here is whether the *Martin* Court's approach violated Martin's 14th Amendment rights. In applying *Cruzan* to these facts, particularly as it relates to the state's interest, it is important to note one substantial fact difference between the cases. In *Cruzan*, Nancy Cruzan was in a persistent vegetative state. Here, Michael Martin is neither in a persistent vegetative state nor terminally ill. Moreover, Martin arguably is manifesting a present desire to live.[11]

I.

Petitioner asserts as her first error that the Michigan Supreme Court decision, by "requir[ing] additional specificity in Michael's description of his condition,"[12] and its alleged failure to "provide citizens with adequate notice of the steps they must take in order to protect their liberty interests,"[13] "unjustifiably extends *Cruzan*'s holding and effectively denies Michael his constitutionally protected interest in being free from invasive and unwanted medical treatment."[14] In essence, petitioner claims that the decision " . . . transforms the clear and

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[11] At trial and on appeal respondents persistently asserted the issue of Martin's present desire to live, as manifested in his adaptability to his circumstances and living setting, as well as in his communications to respondents and others. Respondents argued that, whatever Martin's previously expressed intentions while competent might have been, his present desire to live, however communicated, overrode or revoked his previously expressed intent. The trial court and Court of Appeals did not consider this issue. The Supreme Court declined to review this issue because it was not necessary given its fact-based disposition of the case. (See *Martin, supra*, 450 Mich. at 217, fn. 10.)

[12] Petition for Writ of Certiorari, p. 15.

[13] *Id.*

[14] *Id.*, at p. 12.

convincing evidence standard into one that requires proof 'beyond all doubt.' "[15]

Petitioner's claim seeks to elevate a factual determination with which she disagrees to a constitutional level. Neither *Cruzan* nor the cases upon which its analysis relies countenance such a result. The *Martin* Court engaged in much the same type of analysis as did this Court in *Cruzan*. In its analysis, the *Martin* Court concluded that the right to access to a third party surrogate arises in Michigan by operation of the common law doctrine of informed consent.[16]

The Court summarized the various state approaches to surrogate decision making before settling on the purely subjective standard.[17] Upon adopting the subjective standard, the Court stated its test to determine whether a surrogate should be allowed to consent to the removal of life supporting medical systems:

> Given that the right the surrogate is seeking to effectuate is the incompetent patient's right to

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[15] *Id.*, at p. 13.

[16] "Because the evidentiary and decision-making standards appropriate in a given case do not depend on the source of the right, we need only ground the right in one source.

. . .

We agree with the *[In re] Rosebush* Court [195 Mich. App. 675, 491 N.W.2d 633 (1992)] that a necessary corollary of the common-law right to informed consent is the right not to consent. [Citation and footnote omitted.] . . .

Thus, because we find that the common-law doctrine of informed consent allows a person to refuse life-sustaining treatment, we also decline the invitation to reach the propriety of the constitutional and statutory issues in this case." *Martin, supra*, 450 Mich. at 215-216.

[17] "We find that a purely subjective analysis is the most appropriate standard to apply under the facts of this case." *Id.*, 450 Mich. at 221.

> control his own life, "[t]he question is not what a reasonable or average person would have chosen to do under the circumstances but what the particular patient would have done if able to choose for himself." [Citing *In re Conroy*, 98 N.J. 321, 360-361, 486 A.2d 1209 (1985).] The patient's statements, made while competent, must illustrate "a firm and settled commitment to the termination of life supports *under the circumstances like those presented*. [Citing *O'Connor, supra*, 72 N.Y.2d at 517]. *Id.*, 450 Mich. at 221, emphasis added.

The Court justified the imposition of this test by noting that in those cases which allowed a more objective test, "the patient generally has been comatose or in a persistent vegetative state, . . . " *Id.*, 450 Mich. at 223. The Court further held that:

> In this case, Michael's life and health are not threatened by infirmities of this nature. Because he was competent and able to express his wishes and desires, we decline to move along the continuum from the subjective standard.[18] *Id.*

The Court's final determination was identifying the proper standard of proof. Mirroring this Court's *Cruzan* analysis, the Court adopted the clear and convincing evidence standard,[19] noting that:

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[18] The Court opined that "[e]ven if a test involving objective criteria were applicable in this case, the objective criteria would only strengthen our decision that nutrition and hydration should continue to be provided. . . . By all accounts, Michael is not experiencing any type of pain that would outweigh any enjoyment or pleasure he is experiencing." *Id.*, 450 Mich. at 225-226, fn. 16.

[19] The definition appears at footnote 5, *supra*.

> Among the factors identified as important in defining clear and convincing evidence, [citations omitted] the predominant factor is "a prior directive in which the patient addresses the situations in which the patient would prefer that medical intervention cease." [Citation omitted] *Id.*, 450 Mich. at 227.

It is in this context that petitioner's claim must be evaluated and ultimately must fail. It is disingenuous for petitioner now to claim that Michigan's "specific circumstances" test, such as it is, impermissibly expands this Court's *Cruzan* decision. The Michigan Supreme Court narrowly crafted its analysis to the circumstances with which it was confronted.[20] Its analysis followed this Court's lead in *Cruzan* in every instance, and its statement of the law conforms with *Cruzan*. Indeed, in *Cruzan*, this Court recognized Missouri's central focus on the patient's *wishes*.[21] Michigan took that precise approach, requiring clear and convincing evidence as to Martin's pre-accident wishes. It properly found that those wishes could not be clearly and convincingly determined from the uncorroborated testimony of the petitioner.

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[20] "We express no opinion about the proper decision-making standard for patients who have never been competent, patients existing in a persistent vegetative state, patients who are experiencing great pain or patients who are terminally ill. If a patient has any of these conditions, or ailments of a similar nature, a more objective approach may be necessary and appropriate." *Id.*, 450 Mich. at 223, fn. 15.

[21] "Missouri requires that evidence of the incompetent's *wishes* as to the withdrawal of treatment be proved by clear and convincing evidence. The question, then, is whether the United States Constitution forbids the establishment of this procedural requirement by the State. We hold that it does not." *Cruzan, supra*, at 280, emphasis added.

Petitioner cites three cases to support her assertion that the *Martin* Court erred in its factual determination that Martin's wishes were not clearly and convincingly stated. It is sufficient here to note that in all three cited cases,[22] the petition subjects either were in a persistent vegetative state or were terminally ill. This is particularly important because, as the *Martin* Court recognized, the state's interest in life is elevated if the petition subject is neither in a persistent vegetative state nor terminally ill. Whatever weight the courts in those cases chose to give to the patients' previously expressed intent necessarily was tempered by their then-present medical condition. The *Martin* Court specifically and emphatically declined to analyze the Martin case in those terms.[23]

The determination of "clear and convincing" evidence cannot be made in a vacuum, without considering the general principles regarding the weight and sufficiency of evidence – including the relative value of hearsay; the sufficiency of oral statements of intent when processes exist to integrate intent into a written instrument; the weight of the uncorroborated testimony of an interested party; and the strength of a factual finding which depends upon the testimony of a single witness.

Fortunately, case law from termination of life support cases in other jurisdictions provides guidance on what type of proof rises to the level of "clear and convincing" evidence. In *Cruzan*, the Missouri Supreme Court found that statements similar to those claimed in the present case – although made to a totally disinterested party –

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[22] *Elbaum v. Grace Plaza, Inc.*, 544 N.Y.2d 840 (N.Y. App. Div. 1989) (petition subject in persistent vegetative state); *In re Tavel*, 661 A.2d 1061 (Del. 1995) (92 year old petition subject terminally ill); *In re Swan*, 569 A.2d 1202 (Me. 1990) (petition subject in persistent vegetative state).

[23] See footnote 20, *supra*.

were insufficient to constitute clear and convincing evidence. To rely upon evidence such as Cruzan's statement that she "would not want to continue her present existence without hope as it is," the Missouri court expressed concern about the general nature of her statements, which she made in response to other people's medical condition and treatment, finding that they closely resemble the types of evidence courts have characterized as unreliable. *Cruzan v. Harmon, supra,* 760 S.W.2d at 424. This Court affirmed, saying that Missouri committed no "constitutional error in reaching the conclusion that it did." *Cruzan,* at 285.

Further indications of the high degree of certainty required are found in *O'Connor, supra,* where New York's highest court rejected the numerous statements O'Connor made to three persons over a twenty-year period that she did not want to go on living if she could not "take care of herself and make her own decisions" and "would never want any sort of intervention [or] any sort of life support systems to maintain or prolong her life." Witnesses also ascribed statements to O'Connor – similar to those beliefs here ascribed to Martin – that she hated hospitals and never wished to be in one again, saying "I would never want to lose my dignity." *Id.,* at 531 N.E.2d 610-11.

In reversing lower court decisions ordering that intravenous feeding be discontinued, the Court contrasted O'Connor's statements with those made by a person who exhibits the care of putting her desires in writing, and with those oral statements at issue in *Eichnar v. Dillon,* 52 N.Y.2d 363; 420 N.E.2d 64 (1981), in which the person carefully reflected on the use of a ventilator should he enter a persistent vegetative state. O'Connor's statements, by contrast, were of a type made by many people, especially older people, and the court was concerned about the policy issues raised by relying upon

such statements by a person with a non-terminal condition:

> [I]f such statements were routinely held to be clear and convincing proof of a general intent to decline all medical treatment once incompetency sets in, few nursing home patients would ever receive life-sustaining medical treatment in the future. *Supra*, at 614.

In *Matter of Hughes*, 259 N.J. Super. 193, 661 A.2d 1148 (N.J. Super. AD, 1992), the subject, a Jehovah's Witness, had, just prior to a scheduled operation, specifically advised the hospital and her doctor in writing not to administer a blood transfusion. She also expressed this orally to three family members and the doctor. Although she told five distinct people her specific intent about a specific procedure, and put her intent in writing, and despite having taken such steps contemporaneous to the surgery, these expressions did not constitute clear and convincing evidence. Rather, the court found that the evidence did not show that the patient had made this decision with "full knowledge of the ramifications," including the possibility of complications necessitating a transfusion to save her life.

In the present case, Michael Martin's purported statements are not markedly different than Nancy Cruzan's: neither statement dealt "in terms with withdrawal of medical treatment or of hydration and nutrition." *Id.* at 285.[24]

The difficulty of adequately projecting all future types of care and treatment does not, as petitioner claims, justify a loosening of evidentiary standards so that common statements such as "no machines" becomes "no food

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[24] This Court in *Cruzan* similarly found that the Cruzan facts were less persuasive than the facts in *O'Connor* and *Jobes*. See *Id.*, at 285, fn. 11.

or water," and "not as a vegetable" becomes "not as a conscious and aware but seriously injured person." If such is deemed to be sufficient to encompass all future variables, our nursing homes may soon be empty. The difficulty of anticipating future events, rather than creating carte blanche for family members and medical personnel, dictates that the approach to future care mirror the standard applied to "informed consent" for present care. If a person who currently is competent to exercise his or her decision making capacity must consider all possible treatments and ramifications, then it also is reasonable to insist that a person seeking to establish guidelines for his or her future care do the same.[25]

Petitioner's notice claim, too, is without merit. At the time of Martin's accident, the state of the law was not yet clear as to whether his wishes could have been honored even if he had been specific as to his non-persistent vegetative existence on a feeding tube. He had the option and opportunity to reduce his wishes to writing, again with no clearly established legal right in Michigan to have those wishes implemented. Martin's liberty interests were not clearly defined at the time of his accident.[26] It is illogical to say that a person who has uncertain legal

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[25] It should be noted that the *Martin* Court did not rule out the use of objective criteria in a situation involving a person who is vegetative, terminally ill, or in great pain. See footnote 20 *supra*.

[26] Michigan's Patient Advocate Act, *supra*, passed in 1990, would allow a properly designated third person to execute a patient's treatment decisions if the patient were unable to do so. As petitioner notes, "Michigan still does not have any statute that explicitly recognizes living wills." Petitioner's Petition for Writ of Certiorari, p. 17, fn. 9. It should also be noted, however, that the Patient Advocate Act embraces the content of a living will statute.

rights, if indeed he has any legal rights in the matter at all, is somehow denied notice of the steps to take to preserve those uncertain, and possibly non-existent rights when a court, several years later, finally defines the scope of those rights for him and all Michigan citizens.

The Michigan Supreme Court constitutionally determined that Michael Martin's previously expressed wishes did not clearly and convincingly demonstrate that he would want petitioner, or any other person, withdrawing his feeding tube in his present physical situation. Further, Martin has demonstrated a current desire to live. Petitioner's Petition for Writ of Certiorari on this issue should be denied, and respondents so request this Court.

II.

Petitioner, for the first time in this case's nearly four-year history, raises an issue of purported constitutional significance. Specifically, the petitioner claims that this case raises a question this Court left open in *Cruzan*:

> Whether a State has a constitutional obligation to "defer to the decision of a surrogate if competent and probative evidence established that the patient herself had expressed a desire that the decision to terminate life-sustaining treatment be made for her by that individual."[27]

Petitioner, in order to comply with SUP. CT. R. 14.1(h)[28], which requires a petitioner to "specify the stage

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[27] Petition for Writ of Certiorari, p. 16, quoting *Cruzan, supra*, at 287, fn. 12.

[28] SUP. CT. R. 14.1(h) reads in its entirety as follows:
If review of a judgment of a state court is sought, the statement of the case shall also specify the state in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions

in the proceedings, both in the court of first instance and in the appellate courts" where the federal or constitutional question was raised, claims in a footnote that:

> While [Petitioner] Mary Martin's brief did not specifically cite footnote 12 of the *Cruzan* opinion (parenthetical omitted), its broad reliance on that case and its repeated assertion and defense of Mary as the proper guardian and the person Michael entrusted to ensure that he not be forced to endure life-sustaining medical treatment once his prognosis became hopeless, placed the issue noted in footnote 12 squarely before the Michigan Supreme Court.[29]

Respondents first contend that petitioner failed in any instance to place this issue squarely before any Michigan court, and that therefore petitioner has failed to preserve the issue for appeal to this Court. Further, petitioner has failed to comply with SUP. CT. R. 14.1(h).

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam). Here, petitioner's comment tacitly admits that the precise question she

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> sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts: and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied upon under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph .1(k) of this Rule.

[29] Petitioner's Petition for Writ of Certiorari, p. 8, fn. 6.

seeks to place before this Court has not been litigated below. Nor can it be said that the question was implicitly considered and decided within the other issues considered in the courts below.[30] The *Cruzan* Court, in preserving the question, arguably anticipated a situation where the surrogate's appointment and authority – with specific powers to decide life and death issues for the patient whether or not the patient had previously expressed treatment opinions – was clearly and expressly stated, so that the appointment and authority themselves were not in dispute.

For example, given the skepticism this Court expressed in *Cruzan* regarding unwritten hearsay evidence, it very well could be that such evidence purporting to establish the designation of a surrogate would be viewed as similarly problematic. Since the same compelling state interests would apply to a decision to withdraw

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[30] Indeed, for the question to be ripe, several specific issues should have been argued and decided by the lower courts. These issues would at least include: 1) whether Martin appointed petitioner as his "surrogate;" 2) what standard of proof would be required to determine that Martin did, in fact, appoint petitioner as his "surrogate;" 3) whether this purported designation of a surrogate was corroborated by other, uninterested parties, including the friends with whom Martin had discussed his views; 4) whether a "surrogate" appointment as contemplated by the *Cruzan* footnote would require that the appointment itself be in a writing similar to the writings required to validate wills and transfers of property; and 5) whether Martin's post-injury acceptance of his situation and his expressed desire to live would operate to revoke such an appointment, assuming an appointment had been made. Michigan's policy interest in preserving life, as manifested in its Patient Advocacy Act, *supra*, which had taken effect prior to the hearings in this case, although not directly applicable to this case, also should have been factored into any Michigan court's determination of whether Martin had named petitioner as his surrogate.

life supporting medical equipment made by a surrogate, it is difficult to see how a lesser evidentiary standard would be justified. Further, the designation-of-a-surrogate issue raises *additional* state interests, such as the state's *parens patriae* interest in protecting incompetent persons from abuse and overreaching, so that an even stricter standard regarding the quality of evidence required would be in order.

Petitioner's failure to raise this issue in any of the several layers of proceedings below deprived the Michigan courts of all opportunity to review it. This Court and respondents likewise are denied the chance to review and debate the question to the depth and degree of sophistication anticipated by this Court, and required by jurisprudence to insure the quality and accuracy of the result. For these reasons alone, petitioner's petition to appeal this issue should be denied.

Even if the petitioner did properly raise and preserve the issue below, this Court still should not hear it. Chief Justice Rehnquist, in *Cruzan*, anticipated the argument the petitioner really makes here, that she should be able to decide Martin's course because she is his wife. He observed that:

> Petitioners alternatively contend that Missouri must accept the "substituted judgment" of close family members even in the absence of substantial proof that their views reflect the views of the patient. They rely primarily upon our decisions in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), and *Parham v. J.R.*, 442 U.S. 584 (1979). But we do not think these cases support their claim. In *Michael H.*, we *upheld* the constitutionality of California's favored treatment of traditional family relationships; such a holding may not be turned around into a constitutional

> requirement that a State *must* recognize the primacy of those relationships in a situation like this. And in *Parham*, where the patient was a minor, we also *upheld* the constitutionality of a state scheme in which parents made certain decisions for mentally ill minors. Here again petitioners would seek to turn a decision which allowed a State to rely on family decisionmaking into a constitutional requirement that the State recognize such decisionmaking. But constitutional law does not work that way. *Id.*, 285-286, emphasis in original.

Likewise, petitioner's reliance on *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2804 (1992) is misplaced. In *Casey*, this Court wrestled with principles which are present here. The central issue in *Casey*, as here, was what power or interest, if any, a state had in regulating activity that directly impacted on an individual's fundamental liberty interests. A careful reading of *Casey* can only lead to one conclusion – a state's interest in the regulation increases as the interest in life [in *Casey*, the viability of the fetus] increases. The *Casey* Court noted that:

> We conclude that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate. The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted. *Id.*, 112 S. Ct. at 2816.

That same policy applies here. The state's interest in preserving life increases precisely because Martin is not terminally ill, comatose, or in pain, and he is expressing a current will to live. The *Martin* Court properly concluded that Martin's statements to petitioner did not rise to the

level of clear and convincing proof of what, under the informed consent doctrine, would have been his "intent" given his present condition.[31]

Petitioner asserts that those same insufficient statements now constitute his appointment of her as his "surrogate," and argue that she therefore should be authorized under constitutional principles to exercise her own judgment, and to consent to the termination of his life. This claim is diametrically opposed to the elevated state interest in life found in *Casey*, given Martin's present physical and mental condition.[32] Were petitioner to prevail in her claim, the effect would be that Martin's constitutionally protected liberty interest in life itself would be extinguished because the state's ability to assert its elevated interest in the preservation of life would be eliminated.[33] This outcome must be rejected.

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[31] Petitioner's reliance on *Casey* also is misplaced in light of *Casey*'s call to consult the concept of ordered liberty, as demonstrated by the traditions of the states. In this regard, no state common law decision has authorized termination of life supporting equipment for an incompetent person who is not terminally ill, in a persistent vegetative state, or in intractable pain. Further, in recent years the states have enacted living will and durable power of attorney statutes, none of which authorized termination of life supporting equipment for an individual who is not terminally ill or in a persistent vegetative state absent a writing.

[32] The state's interest also is magnified here because of Martin's current liberty interest, as expressed by the evident manifestation of a current desire to live, and because of the inadequacy of the evidence upon which petitioner's primary legal assertion rested and failed.

[33] Indeed, if the petitioner's argument were successful, the whole legal focus would shift from the expressed interests of the subject of the petition to whether the "surrogate" was duly appointed as the surrogate. If a surrogate has the authority to

CONCLUSION

The Michigan Supreme Court appropriately recognized the state's interest in protecting Michael Martin's constitutional liberty interest in life by imposing a heightened evidence standard against which to measure petitioner's claims of Martin's previously expressed wishes. The *Martin* Court properly found that the evidence presented by petitioner to demonstrate Martin's previously expressed wishes was legally and factually insufficient because it did not meet Michigan's clear and convincing evidence standard. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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decide such issues without reference to the wishes of the subject himself or herself, and without the opportunity of a state to regulate or question that decision making process, the lives of literally hundreds of thousands of people who were elderly or disabled would be placed in peril.